

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Creation of a Low Power Radio Service	)	MB Docket No. 99-25
	)	
Amendment of Service and Eligibility	)	MB Docket No. 07-172
Rules for FM Broadcast Translator	)	
Stations	)	
	)	

Opposition to Petitions for Reconsideration

of

**PROMETHEUS RADIO PROJECT**

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*via electronic filing*

June 15, 2012

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## SUMMARY

In the Commission's *Fourth Report and Order in Creation of a Low Power Radio Service*, the Commission took positive steps in promoting the public's interest in broadcast localism and diversity. The Commission has recognized the difficult balance between widespread need for FM translators and the public's interest in preserving radio market diversity.

In a handful of *Petitions for Reconsideration*,<sup>1</sup> some parties have disputed the Commission's ability to adopt caps limiting the number of translator applications by a single applicant that may be considered for licensing. The parties contend: (1) the Commission did not make clear what constitutes a "market" for the application of the one-to-a-market cap; (2) the Commission has provided inadequate notice of the application caps; (3) the Commission has provided inadequate justification for the caps; (4) the application of any numeral cap to translator applications filed in the 2003 window would be arbitrary and capricious because it would not further the Commission's objectives in making more channels available for new Lower Power FM ("LPFM") stations; and (5) the Commission's policy goals would be better served by providing for waivers of its one-to-a-market policy.

The Commission's actions were taken pursuant to sound legal authority. The actions follow adequate notice, are supported by the record, and are consistent with well-established Commission precedent and policy. Thus, these *Petitions for Reconsideration* must be denied.

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<sup>1</sup> Kyle Magrill, *Petition for Reconsideration*, filed May 7, 2012 [hereinafter Magrill Petition]; Educational Media Foundation, *Petition for Reconsideration*, filed May 8, 2012 [hereinafter EMF Petition]; Hope Christian Church of Marlton, Inc., Bridgelight, LLC, and Calvary Chapel of the Finger Lakes, Inc., *Petition for Reconsideration*, filed May 8, 2012 [hereinafter Hope, et al. Petition]; Conner Media, Inc., *Petition for Reconsideration*, filed May 9, 2012 [hereinafter Conner Petition].

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## **I. THE COMMISSION HAS MADE CLEAR THAT “MARKET” IN THIS CONTEXT REFERS TO MARKETS AS DEFINED BY ARBITRON**

The assertion made by Educational Media Foundation (“EMF”) that the Commission has not defined “market” in this context and that therefore any market-based cap is arbitrary and capricious is without merit.<sup>2</sup> It has never been unclear that “market” in this context referred to Arbitron markets.

The Commission’s *Third Further Notice of Proposed Rulemaking* was published in the Federal Register on July 29, 2011.<sup>3</sup> In that Notice the Commission explained,

*The foregoing section 5 analysis, LPFM spectrum availability analysis, and proposed translator application processing plan rely heavily on Arbitron market definitions. In this regard we note that the DC Circuit has upheld the Commission’s broad authority to define “community” differently in different contexts. We believe that Arbitron market-based assessments as used herein are reasonable for purposes of implementing section 5 of the LCRA [(Local Community Radio Act of 2010)]. A more granular approach would appear to be extremely burdensome and unworkable. Given the fact that the demand for LPFM licenses at particular locations and the availability of transmitter sites near such locations are unknowable prior to the opening of a window, a market-based analysis would appear to provide a*

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<sup>2</sup> EMF Petition at 6–7.

<sup>3</sup> *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, MM Dkt. No. 99-25, 26 FCC Rcd. 9986 (rel. July 12, 2011), 76 Fed. Reg. 45491 (July 29, 2011) [hereinafter Third Further Notice].

reasonable ‘global’ assessment of LPFM spectrum availability in particular areas.<sup>4</sup>

Two paragraphs later, discussing strategies for the prevention of trafficking in translator station construction permits and licenses, the Commission stated,

Having tentatively concluded that the Commission must process the remaining translator applications differently, *we must consider whether a market-specific spectrum-based dismissal policy is sufficient to safeguard the integrity of the translator licensing process.*<sup>5</sup>

In the *Fourth Report and Order*, the Commission referred back to this query:

The Commission sought comment on the methodology of its study, and whether a market-tier approach was a reasonable means for effectuating both Section 5(1) and 5(2) directives. *It also sought comment on whether use of Arbitron market-based assessments as used therein was reasonable for purposes of implementing section 5 of the LCRA, and tentatively concluded that a market-based analysis would provide a reasonable “global” assessment of LPFM spectrum availability in particular areas.* It sought comment on whether defining the Section 5(2) term “local community” in terms of markets was reasonable and whether it was

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<sup>4</sup> *Id.* at 9998 ¶ 30 (emphasis added).

<sup>5</sup> *Id.* at 9998 ¶ 32 (emphasis added).

appropriate to use the same definition for LPFM and translator purposes.<sup>6</sup>

After summarizing comments on the issue, the Commission concluded,

Despite the divergence of views about interpreting the LCRA, there is relatively broad agreement with respect to our proposal to effectuate Section 5 with market-specific spectrum availability metrics. Significantly, no commenter provided a comprehensive statutory interpretation pointing to a fundamentally different approach. *Accordingly, we adopt, with certain modifications, the market-specific processing approach outlined in the Third Further Notice.*<sup>7</sup>

“Market” as used in these documents is clearly defined as an Arbitron market, and referred to consistently throughout. Given the language in the *Third Further Notice of Proposed Rulemaking* and consistent language in the *Fourth Report and Order* adopting the proposal, it is clear beyond doubt that “market” in the context of these documents is defined as an Arbitron market. EMF’s claim that “market” is insufficiently defined must therefore be rejected.

## II. THE COMMISSION HAS COMPLIED WITH ADMINISTRATIVE PROCEDURE ACT NOTICE REQUIREMENTS

Kyle Magrill’s (“Magrill”) claim that the Commission adopted translator application caps without providing interested parties sufficient notice and opportunity

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<sup>6</sup> *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, MM Dkt. No. 99-25, 27 FCC Rcd. 3364, 3378 ¶ 30 (rel. Mar. 19, 2012), 77 Fed. Reg. 21002, 21007 (Apr. 9, 2012) (emphasis added) [hereinafter Fourth R&O].

<sup>7</sup> *Id.* at 3382 ¶ 38 (emphasis added).

to comment is without merit.<sup>8</sup> Section 553(b) of the Administrative Procedure Act (“APA”) only requires that “general notice be published in the federal register” and that the agency afford “interested persons an opportunity to participate.”<sup>9</sup> Notice is sufficient if it includes “a description of the subjects and issues involved.”<sup>10</sup> Moreover, no public notice is required for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>11</sup>

The Commission indisputably provided notice with respect to its proposal to implement translator application caps, and solicited comment on various possible caps. For example, in the *Third Further Notice of Proposed Rulemaking*, the Commission stated,

We tentatively conclude that nothing in the LCRA limits the Commission’s ability to address the potential for licensing abuses by any applicant in Auction No. 83. We seek comment on this issue. We also seek comment on processing policies to deter the potential for speculative abuses among the remaining translator applicants. For example, we seek comment on whether to establish an application cap for the applications that would remain pending *in non-spectrum limited markets and unrated markets*. Would a cap of 50 or 75 applications in a window force high filers to concentrate on those proposals and markets where they have *bona fide* service aspirations? In addition or alternatively, should

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<sup>8</sup> Magrill Petition at 1 (“The FCC did not propose this in the NPRM.”).

<sup>9</sup> 5 U.S.C. § 553(b).

<sup>10</sup> *Id.* § 553(b)(3).

<sup>11</sup> *Id.* § 553(b)(A).

applicants be limited to one or a few applications in any particular market?<sup>12</sup>

Magrill alleges that “[t]here was no discussion of dismissing all but one application in non-spectrum limited markets.”<sup>13</sup> But the quote above specifically solicits comment on “whether to establish an application cap for the applications that would remain pending in non-spectrum limited markets and unrated markets,” asking, “should applicants be limited to one or a few applications in any particular market?” This notice was published in the Federal Register and ample time was provided for interested parties to make their views known. Magrill’s claim of insufficient notice must therefore be rejected.

### **III. THE CAPS ARE JUSTIFIED IN THE PUBLIC INTEREST AND THE COMMISSION HAS PROVIDED ADEQUATE JUSTIFICATION IN THE RECORD**

It is in the public interest both to prevent speculation and, relatedly, to preserve radio market diversity. Although the petitioners represent parties with a legitimate interest in expanding their operations, the public’s interest in a diverse media landscape is paramount. The public’s interest in preserving radio market diversity is well-established and critical in this context. Conversely, petitioners’ reasons for seeking expansion of the translator rules at this point in time are less convincing. Conner Media Inc. (“Conner”) would like expansion of cross-service translators, but such expansion would be premature at this time given the recency with which translators were made available for this purpose and, therefore, an inability for the Commission or the public to fully assess the impact of this shift. Hope Christian Church of Marlton, Inc., et al. (“Hope, et al.”) argue that the one-to-a-market limit must be eliminated to maintain

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<sup>12</sup> Third Further Notice, 26 FCC Rcd. at 9999 ¶ 34 (emphasis added)

<sup>13</sup> Magrill Petition at 1.



equality of comparative status between translator and LPFM applications, but most markets currently have many translators already, but have few or no LPFM stations. Finally, Magrill argues that the addition of HD programming increases the need for multiple translators, but broadcasters' decision to create additional HD programming streams does not entitle them to use additional spectrum with analog broadcast facilities.

**A. It Is in the Public Interest to Prevent Speculation and Preserve Radio Market Diversity**

In granting applications for use of the spectrum, the Commission is statutorily committed to consider "public interest, convenience, and necessity."<sup>14</sup> In this vein, under the LCRA, the Commission has a mandate to ensure that licenses for FM translators, FM boosters, and LPFM are made available "based on the needs of the local community."

The Third Circuit summarized the Commission's public interest mission, including its focus on diversity, in *Prometheus Radio Project v. F.C.C.*:

In 1934 Congress authorized the Commission to grant licenses for private parties' exclusive use of broadcast frequencies. Recognizing that the finite radio frequency spectrum inherently limits the number of broadcast stations that can operate without interfering with one another, Congress required that broadcast licensees serve the public interest, convenience, and necessity.

In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media

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<sup>14</sup> 48 U.S.C. § 309(a).

ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.<sup>15</sup>

Conner disputes that the translator application caps are consistent with the public interest, pointing out that because the caps will be applied to applications that were already filed during the 2003 window, implementation of the caps will fail to “deter” future speculation.<sup>16</sup> But although the caps as applied to this window may not deter *attempts* at speculation that have already taken place, they will prevent *actual* speculation. Furthermore, they will preserve the diversity of radio markets so that available spectrum may be licensed in a way that is consistent with the public interest in this and future application windows.

Hope, et al. assert that “[t]he Commission has articulated no reason that justifies its concern that all, or even a majority, of applicants for multiple facilities within a market are engaged in speculative behavior or trafficking or otherwise do not intend to construct the facilities for which they have sought authorizations.”<sup>17</sup> But the Commission has not asserted that “all, or even a majority, of applicants for multiple facilities within a market” are engaging in speculation. Not every applicant need be a speculator in order for the Commission to implement a policy designed to prevent harmful speculation and preserve available spectrum for diverse uses.

Moreover, the combination of the one-to-a-market rule and the national cap of 50 applications constitute prudent limits designed to preserve diversity in local markets

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<sup>15</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382–83 (3d Cir. 2004) (internal quotations omitted) (citing Communications Act of 1934, 47 U.S.C. §§ 307(a), 309(a), 310(d), 312; *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978)).

<sup>16</sup> Conner Petition at 3.

<sup>17</sup> Hope Petition at 6.

without unreasonably burdening single entities that may reasonably serve a number of local communities nationwide.

#### **B. The Commission Should Not Lift Caps to Serve Cross-Service Translators**

Conner argues that AM stations need multiple translators to achieve a degree of coverage parity with their FM competitors, and that AM stations may need multiple translators to achieve nighttime service to the areas that depend upon them.<sup>18</sup> Although the Commission has permitted cross-service translators to benefit AM broadcasters, this is not a sufficient reason to lift the one-per-market cap on pending Auction 83 translator applications. AM broadcasters received a major boon in 2009 when cross-service translators were first permitted, and again in March 2012 when this decision was applied retroactively to pending Auction 83 translator applications.<sup>19</sup> Yet Auction 83 applicants were not aware of the cross-service translator rule change when applying for construction permits, and so presumably intended to construct facilities to rebroadcast FM programming only. By encouraging the sale of their construction permits to AM broadcasters now, the Commission would be acting to support, rather than discourage, trafficking in permits. Rather than encouraging trafficking in Auction 83 permits, the Commission should retain the one-per-market cap.

#### **C. Most Markets Already Have Many Translators but Few or No LPFM Stations**

The Commission's one-per-market cap does not, as Hope claims, elevate LPFM applications over FM translators.<sup>20</sup> Far from elevating LPFM applications over FM

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<sup>18</sup> Conner Petition at 2-3.

<sup>19</sup> Prometheus has opposed the wholesale lifting of the cross-service ban without more specific eligibility requirements to serve the public interest. *See* Comments of Prometheus Radio Project, United Church of Christ, and Future of Music Coalition, MM 99-25, at 30 (filed July 9, 2011).

<sup>20</sup> Hope Petition at 4.

translator applications, the one-per-market cap is a crucial way to address the existing disparity in license holders and thereby treat both LPFM and FM translators equally, as required by the LCRA.

Most markets already have many licensed FM translator stations. In the 155 markets analyzed in Appendix A of the Commission's *Fourth Report and Order* there are 239 licensed LPFM stations.<sup>21</sup> In contrast, in those same markets there are 1,580 licensed FM translators—about 6.6 times the number of LPFM stations.<sup>22</sup> In fact, 51 of these markets have absolutely no licensed LPFM stations. These markets include the major markets of New York, Boston, Philadelphia, Dallas-Ft. Worth, and the Miami-Ft. Lauderdale-Hollywood markets.

Moreover, the Commission's analysis has established that "limited useful spectrum for future LPFM stations is likely to remain in numerous specific radio markets unless the translator dismissal procedures reliably result in the dismissal of *all* "blocking" translator applications."<sup>23</sup> On the other hand, it is significantly easier to ensure that licenses will be available for future translator stations even after LPFM license distribution because "licensing asymmetries between the translator and LPFM services make it unlikely that LPFM licensing will preclude translator licensing opportunities, even in spectrum-limited markets."<sup>24</sup>

Given the disparity between the FM translators and LPFM it is clear that the Commission's one-per-market cap is a reasonable measure to honor its mandate that both be treated equally. As such, Hope's claim of inequality should be rejected.

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<sup>21</sup> *Fourth R&O* at Appendix A.

<sup>22</sup> *Id.*

<sup>23</sup> *Third Further Notice* at 45493 ¶ 7.

<sup>24</sup> *Id.* at 45494 ¶ 13.

**D. The Decision to Create Additional HD Programming Streams Does Not Entitle Broadcasters to Use Additional Spectrum for Analog Broadcast Facilities**

Magrill asserts that “HD2, HD3, and HD4 programming have increased the need for multiple translators, covering the same regions, in each market.” But broadcasters are not required to offer HD programming, and the decision to do so does not entitle those who take advantage of it to use additional spectrum for additional analog broadcast facilities. Moreover, because HD radio has only been made available to incumbent broadcasters, creating additional policies to serve HD broadcasters with translators would only serve to further reduce opportunities for new entrants.

**IV. A WAIVER POLICY WOULD NOT BETTER SERVE THE PUBLIC INTEREST**

For the reasons elaborated upon above, the current rules are well-supported and consistent with the public interest. We disagree, therefore, with Hope, et al.’s assertion that “the Commission’s policy goals . . . would be far better served by providing for waivers of its one-to-a-market policy.”<sup>25</sup> A broad waiver policy applied to the one-to-a-market rule would threaten the public interest by decreasing market diversity. Thus the Commission was justified in establishing a one-to-a-market cap with no waiver policy at this time, and petitioners’ plea for a waiver policy should be dismissed.

Should the Commission nevertheless consider implementing a waiver policy, we do recognize that it may be possible to do so in a manner not inconsistent with the public interest, because there may be very limited circumstances in which a single party could receive multiple licenses in a single market without decreasing market diversity. A waiver policy would not be inconsistent with the public interest if it were carefully restricted, applied sparingly, and did not delay the issuance of LPFM licenses.

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<sup>25</sup> Hope Petition at 3.

The waiver policy proposed by Hope, et al. would not meet these standards without further restrictions to safeguard the public interest. In the event the Commission decides to adopt a waiver policy, the alternative policy proposed by REC Networks better ensures diverse radio markets while allowing local broadcasters to expand their coverage in rural areas. Critical to the public interest, however, is speedy completion of the licensing process with respect to all Section 5 services. We are concerned that the implementation of any waiver policy—even one comprising bright-line objective criteria—could unnecessarily delay the LPFM application window. Thus although the waiver proposal advanced by REC Networks would be more protective of LPFM opportunities than the proposal advanced by Hope, et al., the Commission should not adopt it for pending Auction 83 translator applications if it would delay LPFM processing.<sup>26</sup>

Therefore, if creation of a waiver policy otherwise consistent with the public interest would be likely to delay the LPFM application window, the FCC should not adopt it.

## CONCLUSION

In the Commission's *Fourth Report and Order in Creation of a Low Power Radio Service*, the Commission recognized and successfully navigated the difficult balance between widespread need for FM translators and the public's interest in preserving radio market diversity. The Commission's actions are within its legal authority, in compliance with the APA, and benefit the public interest while preserving the ability of FM translators to fulfill the needs of local communities.

The issues submitted in the Petitions for Reconsideration are baseless in light of the record and as such should be rejected. The Commission clearly defined what

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<sup>26</sup> Partial Opposition to Petitions for Reconsideration of REC Networks, MM Dkt. 99-25, at 5-7 (filed May 10, 2012).

constitutes a “market” as the Arbitron market for the application of the one-to-a-market cap in the *Third Further Notice of Proposed Rulemaking* and its consistent language in the *Fourth Report and Order*. The Commission has also provided adequate notice of the application caps by publication in the Federal Register. Finally, the Commission has provided adequate justification to demonstrate that the caps are reasonable and consistent with the public interest.

For the foregoing reasons, Prometheus urges the Commission to dismiss the *Petitions for Reconsideration*.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 15, 2012, pursuant to the 47 C.F.R. § 1.429, a copy of the foregoing Opposition was served by first class U.S. mail, postage prepaid, upon the petitioners:

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